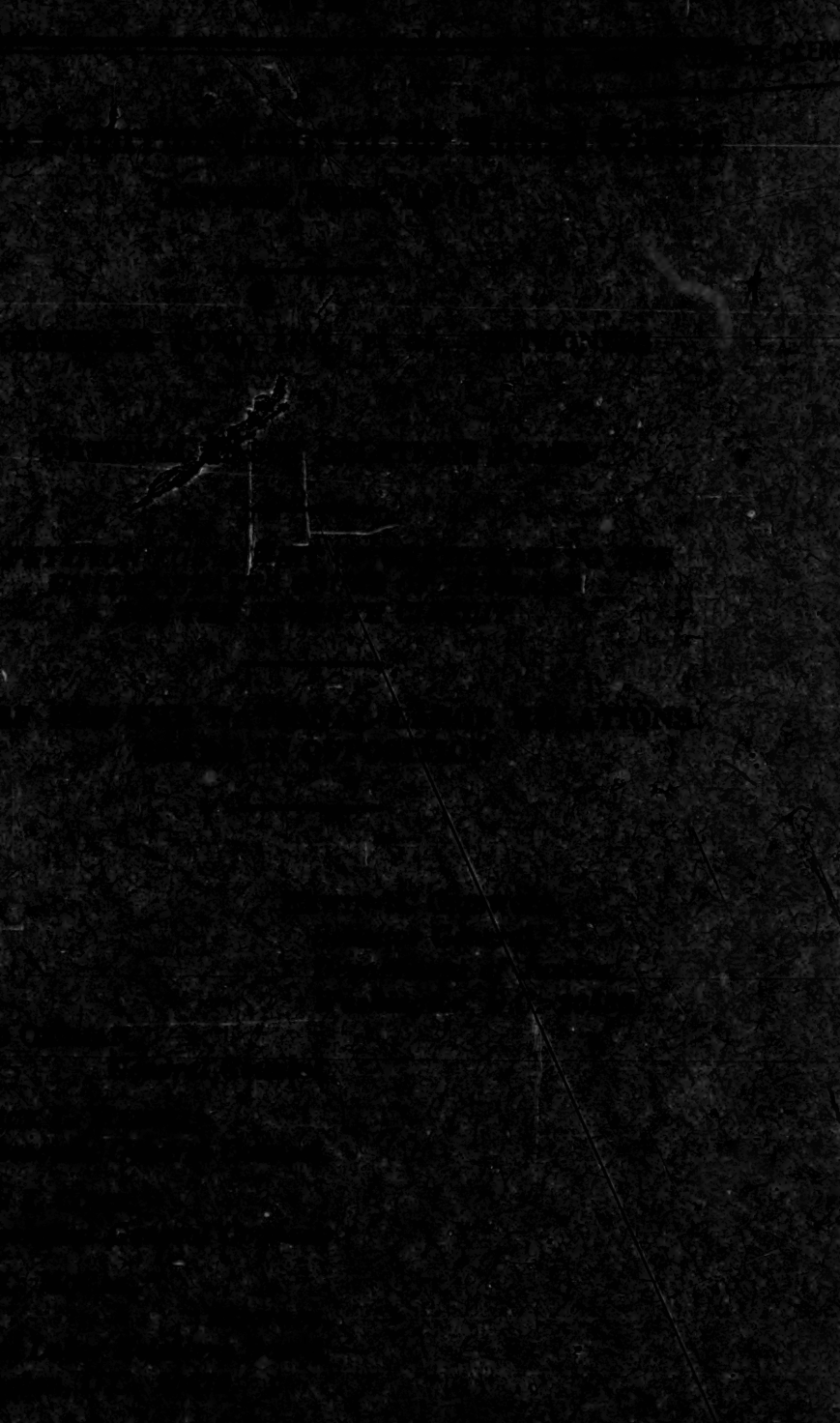

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 249

SCHMERLER FORD, INC., *et al.*, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals enforcing the Board's order (Pet. App. 33a-46a) is reported at 424 F. 2d 1335. The Board's decision and order (Pet. 18a-30a, 32a) are reported at 175 NLRB No. 90.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on May 13, 1970. The petition for a

writ of certiorari was filed on June 11, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly concluded that the union's pre-election statements that it would seek to incorporate a "price-fixing" arrangement in any collective agreement ultimately negotiated with the employer, neither impaired the representation election which the union subsequently won nor automatically justified the employer's refusal to recognize it as the bargaining representative of his employees.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the petition (Pet. App. 46a), and as follows:

Sec. 2. When used in this Act—

* * * *

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

STATEMENT

In early spring of 1968, the Union [1] filed with the Board's Regional Director petitions for representation elections among the salesmen at each petitioner's automotive dealership in the Chicago area (Pet. App. 19a; R. 25, 29).[2] Based on the records of the hearings held on those petitions, the Regional Director found that the Union was a labor organization within the meaning of Section 2(5) of the Act and directed elections among employees in various separate units; he rejected petitioners' contention that the Board should deny its processes to the Union because the latter was engaged in a price-fixing conspiracy (Pet. App. 2a-8a).[3] The Regional Director noted that the

---

[1] American Federation of Professional Salesmen, Local 5056, unaffiliated.

[2] "R." refers to the joint appendix filed in the court below.

[3] Petitioners contended that, although the Union might technically fulfill the statutory requirements of a "labor organization," the Board should not lend its processes to such an organization because it was engaged in "a bold conspiracy to foist an unlawful price-fixing program on the automobile dealers in the six-county Chicago area" (Pet. App. 3a). In support of their contention, petitioners relied on (a) discussions at a Union meeting of January 28, 1968, of a possible pricing formula to be proposed to employers in contract negotiations (Pet. App. 5a; R. 9, 37, 85, 86); (b) Union letters sent to some employers in February 1968, in which the Union claimed majority status, requested recognition, and also stated that the employer should find out how the Union's proposed collective bargaining agreement "could guarantee you [the employer], and all the dealers in the area, a *minimum* net profit (I repeat NET) equal to three per cent of the list price of the unit" (Pet. App. 5a; R. 84-85); and (c) Union

Act accorded employees wide latitude to select any representative that they desired, and that it was entirely speculative whether the Union would be chosen by a majority of any company's employees, and, if selected, whether it would actually seek to incorporate its allegedly illegal "price-fixing" plan into a collective bargaining agreement (Pet. App. 6a). Petitioners sought Board review of the Regional Director's determination, but the Board denied each request on the ground that it raised "no substantial issues warranting review" (Pet. App. 18a).

In the subsequent elections, the Union received a majority of the votes cast at each petitioner's place of business, and was duly certified as the exclusive bargaining representative in each unit (see, *e.g.*, R. 52, 87). Thereafter, the Union requested bargaining with each of the petitioners, but received no response (R. 40-45; 88-95). The Union filed unfair labor practice charges with the Board, and complaints were issued thereon (R. 32; 24, 29). Each employer's answer denied that the Union was a labor organization within the meaning of Section 2(5) of the Act and that the Union was the employees' exclusive bargaining representative, alleging that the Union's certification was invalid because of "the reasons asserted in the representation proceeding" (Pet. App. 23a-24a).

---

literature distributed to various automobile salesmen during the organizing campaign stating that the salesmen should join the Union to "put your employer back into the retail business by guaranteeing him a net profit, after all expenses are paid, equal to three percent of the list price" (Pet. App. 5a; R. 37-38, 59, 60).

The Board, adopting the Trial Examiner's decision, found that the Union was a labor organization within the meaning of Section 2(5) of the Act, that the Union had duly requested each petitioner to bargain, and that each, by refusing to do so, had violated Section 8(a)(5) and (1) of the Act (Pet. App. 27a-28a, 32a).[4] The Board ordered petitioners to cease and desist from the unfair labor practices found, to bargain collectively with the Union upon request, and to post appropriate notices (Pet. App. 29a-30a, 32a).

The court of appeals (Judge Hastings dissenting) sustained the Board's findings and enforced the Board's order (Pet. App. 33a-46a). The court held that petitioners had failed to satisfy their burden of establishing that the Regional Director abused his discretion in directing the representation elections (Pet. App. 37a-38a, 40a-41a), and that petitioners' refusal to bargain before "any proposal, legal or illegal * * * had been presented by the Union * * * was precipitous and excessive" (Pet. App. 40a), particularly since the Board had ruled "that petitioners need not bargain on price-fixing" (Pet. App. 39a, n. 3; 41a).

---

[4] The Trial Examiner found that the possibility that the Union might propose a "price-fixing" scheme did not impair its status as a labor organization under the Act, since petitioners could have adequately handled the matter "by saying nay to price fixing and aye to working terms and conditions" (Pet. App. 23a). He noted that the Board, in a companion case, had specifically held that any employer confronted with an unlawful "price-fixing" bargaining proposal "would be free to reject it and could not be compelled to do otherwise" (Pet. App. 25a, n. 5).

ARGUMENT

Petitioners' basic contention is that the election results were improperly influenced by the Union's statements that it would seek to incorporate in any collective agreement a price-fixing proposal which would violate the Sherman Act. Since the Board found, and the court below agreed, however, that there was no adequate basis in the record for concluding that these statements affected employee free choice, petitioners' contention raises essentially only an evidentiary issue which does not warrant further review. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 491.[5]

In any event, the Board was not unreasonable in declining to set the elections aside and certifying the Union as the representative of petitioners' employees. As the court below noted, there is no evidence as to how prominent the allegedly illegal proposals were in the overall campaign, no evidence of the number of employees to whom the proposals were communicated, and no indication of how long the proposals persisted after petitioners objected to the illegality of the scheme (Pet. App. 37a). Moreover, the pricing proposals

---

[5] Judge Hastings' dissent is grounded not on the "general propositions of law relied upon by the majority," but rather on "their application to the facts of the case before us" (Pet. App. 41a). Thus, reading the record differently than did the Board and the court majority, he concluded that a sufficient showing had been made that the Union's price-fixing proposal had a significant effect on its organizational campaign and thus warranted setting the elections aside (Pet. App. 42a, 45a).

were put forth in January and February 1968, long before the elections were held, allowing the dealers ample time "to respond by pointing out any defects, legal or otherwise" (Pet. App. 38a).[6] Finally, since the Union had not as yet presented any proposal, legal or otherwise to petitioners and they were free to reject any that violated the Sherman Act, the Board properly refused to intrude upon the broad freedom which the Act accords employees in selecting a bargaining representative.

The case relied on by petitioners (Pet. 12), *Truck Drivers and Helpers, Local Union 568* v. *National Labor Relations Board*, 379 F. 2d 137 (C.A. D.C.), is clearly distinguishable. There, the union published on the day before the election material in which it promised to breach its duty of fair representation toward one group of employees. The court found that the union's promise of illegal action, coupled with the impact of that promise on the employees' freedom of choice in the election, amounted to coercion in violation of Section 8(b)(1)(A) of the Act. 379 F. 2d at 144. In the instant case, the assertedly illegal proposals took place many months before the election, and the employers had ample opportunity to counteract any coercive effect.

---

[6] It was in this context that the court below stated that the record is devoid of "proof that the scheme won the election for the Union" (Pet. App. 37a). When read in context, it is clear that the court was not imposing a new standard (cf. Pet. 8), but merely registering its view, different from that of petitioners, that this "propaganda" did not affect the outcome of the elections.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

JANET C. MCCAA,
Attorney,
National Labor Relations Board.

JULY 1970